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STATE OF LOUISIANA

NUMBER: 01-13-0316 SEC. II

VERSUS

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

SAMUEL NICHOLAS

STATE OF LOUISIANA

**MOTION FOR DAUBERT HEARING TO DETERMINE
ADMISSIBILITY OF DNA EVIDENCE**

NOW INTO COURT, through undersigned counsel comes SAMUEL NICHOLAS, and pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 2, 3, 5, 13, 14, 16, 17, 19, 20, 22, and 24 of the Louisiana Constitution, hereby moves the Court to conduct a *Daubert* hearing to determine the admissibility of expert testimony in the area of DNA analysis. As grounds therefore the accused states as follows:

1.

On January 16, 2013, a grand jury returned an indictment charging Mr. Nicholas and two other defendants with one count second degree murder and one count attempted second degree murder.

2.

During the discovery, the prosecution provided the defense with copies of two reports of DNA analysis of various items collected from the crime scene. The results and conclusions of the two reports are inconsistent as a result of the various testing methods used first by the Louisiana State Police Crime Laboratory that could not reach a conclusion as to the DNA testing, and secondly, from the testing of a lab in Pittsburgh, Pennsylvania by the name of Cyber Genetics, which in fact was able to reach conclusions based on their own method of testing.

3.

The Supreme Court has announced standards trial judges should consider in determining whether to admit expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *Daubert* established the following non-exclusive factors to be considered by district courts to determine the admissibility of expert testimony:

- (1) The "testability" of the scientific theory or technique;
- (2) Whether the theory or technique has been Subjected to peer review and publication;
- (3) The known or potential rate of error; and

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- (4) Whether the methodology is generally accepted in the scientific community.

509 U.S. 579 at 592 at 592-94, 125 L. Ed. 2d 469, 113 S. Ct. 2786.

4.

In *State v. Foret*, 628 So.2d 1116 (La.1993), the Louisiana Supreme court compared the La. Code Evidence art. 702, which governs the admissibility of expert testimony, and concluded that it was “virtually identical” to Rule 702 of the Federal Rules of Evidence. “Subsumed in the requirements of Rule 702 is the premise that expert testimony must be reliable to be admissible”. 628 So. 2d at 1121. *Foret*, 628 So. 2d at 1123 (citation omitted). “The above-noted similarity between the federal and Louisiana rules on the admission of expert testimony, coupled with similar guidelines for the admissibility of expert scientific testimony pronounced by this court in *Catanese* persuade this court to adopt [the] *Daubert v. Merell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), requirement that expert scientific testimony must rise to a threshold level of reliability in order to be admissible under La. C.E. art. 702.” *Foret*, 628 So. 2d at 1123. Accordingly, *Foret* adopted the *Daubert* admissibility criteria quoted above. See also, *State v. Quatreving*, 93-1644 (La. 2/28/96); 670 So.2d 197.

5.

Procedurally, *Foret* and its progeny adopt *Daubert*'s protocols for the admissibility of expert testimony in federal courts. That, is *Foret* recognizes that trial courts should serve as “gate-keepers” when expert testimony is at issue, conducting pretrial admissibility hearings to determine if the *Daubert* factors militate in favor of, or against admissibility. *Foret*, 628 So.2d at 1123-1125. The Court must conduct a pretrial hearing so that any adverse rulings can be tested on writs. See, e.g., *State v. Morrison*, 03-2790 (4/8/04) 871 So.2d 1086 (granting writ and remanding for additional hearings where “the present record does not provide this Court with an adequate basis for determining whether the trial judge properly exercised his gate-keeping function under *Daubert*”); see also, *State v. Chauvin*, 02-1188 (La 5/20/03), 846 So.2d 697; *State v. Edwards*, 97-1797 (La. 07/02/99), 750 So.2d 893.

6.

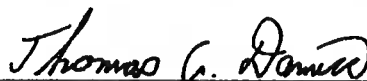
In this case the inconsistent DNA reports yield little information about the method used to extract DNA from samples and subsequently amplified.

Accordingly, the Court must conduct a pretrial *Daubert* hearing on the admissibility of DNA analysis in this case. La. Rev. Stat. §15:441.1 provides in part that “evidence of deoxyribonucleic acid profiles... offered to establish the identity of the offender of any crime is relevant as proof in conformity with the Louisiana Code of Evidence.” However, whether DNA analysis is admissible in a given case, while relevant, must as noted, comply with the Evidence Code article in question, La C.E. art. 702. At issue are what methods were used to extract the DNA and to amplify it. Also at issue is what database and what statistical model was used to project the chance that a given alleged donor in fact contributed the DNA at issue. The only way to sort out these complicated forensic questions is at a pretrial *Daubert* hearing. See *State v. Manning*, 03-1982 (La. 10/19/04), 885 So. 2d 1044, 1086-1088 (Discussing pretrial DNA *Daubert* hearing in capital case).

WHEREFORE, the Court must conduct a pretrial *Daubert* hearing as requested herein.

Respectfully submitted,

DAMICO & STOCKSTILL
ATTORNEYS AT LAW



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ORDER

Considering the foregoing motion,

IT IS HEREBY ORDERED that the defendant Samuel Nicholas Motion for a Pretrial Daubert Hearing to Determine the admissibility DNA Evidence is Hereby Granted, and that same be heard on the ___ day of _____, 2014 at ___ o'clock, ___ .m.

Baton Rouge, LA this ___ day of _____, 2014.

JUDGE, 19TH JUDICIAL DISTRICT COURT

CERTIFICATE

I hereby certify that a copy of the above and foregoing motion has been hand delivered this date to Adam Haney, Assistant District Attorney.

Baton Rouge, LA this 7th day of February, 2014.

Thomas C. Damico

THOMAS C. DAMICO

Entry:

CHARGE(S): SECOND DEGREE MURDER, ATTEMPTED SECEND DEGREE MURDER This matter came before the Court for motion hearing, pursuant to previous assignment. The accused was present in court represented by Mr Thomas Damico. Ms Dana Cummings, Assistant District Attorney, was present for the State of Louisiana. The State entered evidence S-1, S-2, S-3, S-4, S-5, S-6, S-7,S-8, S-9, S-10, S-11, S-12, S-13, S-14, S-15, S-17, and S-18, all without objection from the defense. It was stated by the State and defence that evidence S-14 and S-15 are entered for the use of the Daubert hearing only. For oral reasons assigned, the Court ruled in favor of the State and allowed the DNA evidence to be processed through a TrueAllele Lab. On joint motion of the State and defense counsel, the Court ordered that the matter be continued until March 12, 2015, at 9:00 am. Notice was given to the accused and counsel in open court.

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